

NEW YORK COURT OF APPEALS

Caldwell v. Cablevision Systems Corp.

20 N.Y.3d 365 (N.Y. 2013) · Decided February 7, 2013

SUMMARY

The New York Court of Appeals held that testimony from a subpoenaed fact witness who receives compensation exceeding the statutory witness fee is generally admissible. However, when the payment appears disproportionate and the subpoenaing party offers no explanation, the trial court must, upon a timely request, instruct the jury to consider whether the compensation may have influenced the witness's testimony. The court affirmed because the failure to give a specific bias instruction was harmless under the circumstances.

CASE DETAILS

COURT	New York Court of Appeals
WRITING FOR THE COURT	Pigott, J.; Chief Judge Lippman; Judge Graffeo; Judge Read; Judge Smith
JURISDICTION	New York
DECIDED	February 7, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed from an order affirming a judgment entered after a bifurcated negligence trial in which the jury found CSI negligent but found that its negligence was not a substantial factor in causing the accident.
STANDARD OF REVIEW	The Court reviewed the trial court's evidentiary ruling and jury-charge determination for abuse of discretion and assessed whether the failure to give the requested specific bias instruction was prejudicial; the court concluded that the omission was harmless under the circumstances.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Bessie Caldwell, Caldwell plaintiffs v. Communications Specialists, Inc., Cablevision Systems Corporation

TOPICS

evidence jury instructions negligence civil procedure

PRACTICE AREAS

evidence

civil procedure

negligence

jury instructions

legal ethics

QUESTIONS PRESENTED

1. Whether a subpoenaed fact witness's testimony is inadmissible as a matter of law because the witness received compensation substantially exceeding the statutory attendance fee.
2. Whether the trial court was required, upon a timely request, to give a jury instruction specifically addressing the potential bias created by a disproportionately large payment to a fact witness.
3. Whether the trial court's failure to give the specific bias instruction required reversal under the circumstances of this case.

HOLDINGS

1. A subpoenaed fact witness's testimony is generally admissible even when the witness receives compensation exceeding the statutory attendance fee, provided the payment is not contingent on the content of the testimony or the outcome of the litigation.
2. When a fact witness receives compensation that appears disproportionately greater than reasonable compensation for lost time and incidental expenses, and the subpoenaing party offers no explanation for the payment, the trial court must, upon a timely request, give a specific jury instruction addressing the potential bias created by the payment.
3. The trial court's failure to give the requested specific bias instruction was harmless and did not require reversal.

KEY QUOTATIONS

"We conclude that such testimony is generally admissible, but that the trial court should, in a proper case, charge the jury as to the witness's potential bias, in light of the perceived excessiveness of the fee." (20 N.Y.3d at 369)

"Although this is only the minimum that must be paid to a subpoenaed fact witness, that does not mean that an attorney may pay a witness whatever fee is demanded, however exorbitant it might be." (20 N.Y.3d at 370)

"What is not permitted and, in fact, is against public policy, is any agreement to pay a fact witness in exchange for favorable testimony, where such payment is contingent upon the success of a party to the litigation" (20 N.Y.3d at 371)

"Supreme Court should have instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business." (20 N.Y.3d at 372)

FACTUAL BACKGROUND

CSI performed fiber-optic cable installation beneath Benefield Boulevard, cutting and backfilling a trench and test pits without repaving the street before the accident. Bessie Caldwell tripped while crossing the street and

claimed that she stepped into a dip in the trench. CSI subpoenaed the physician who treated Caldwell after the accident to testify as a fact witness about an emergency-room note stating that she had tripped over her dog; CSI paid the physician \$10,000 for approximately one hour of testimony.

PROCEDURAL HISTORY

After discovery, the matter proceeded to a bifurcated trial on liability. The jury found CSI negligent but not a substantial factor in causing the accident, and Supreme Court denied plaintiffs' motion to set aside the verdict. The Appellate Division affirmed, holding that the trial court should have given a more specific instruction concerning the potential bias of a fact witness who received a substantial payment, but found the error harmless. The New York Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Robinson, 151 App. Div. 589 (1st Dep't 1912), aff'd, 209 N.Y. 354 (1913)
- Bergoff Detective Serv., Inc. v. Walters, 239 App. Div. 439 (1st Dep't 1933)

OPINION

PIGOTT, J.

OPINION OF THE COURT Pigott, J. At issue on this appeal is whether the testimony of a subpoenaed fact witness, who receives a fee alleged to be disproportionately in excess of CPLR 8001 (a)'s mandatory fee requirement for attendance at trial, is inadmissible as a matter of law.

We conclude that such testimony is generally admissible, but that the trial court should, in a proper case, charge the jury as to the witness's potential bias, in light of the perceived excessiveness of the fee. Where, as here, the party that subpoenaed the witness offers no explanation for a fee that is seemingly in excess of reasonable compensation for lost time and incidental expenses, the trial court, upon a timely request by an objecting party, must charge as to the witness's potential bias.

L In September 2006, defendant Communications Specialists, Inc. (CSI), per its contract with Cablevision Systems Corporation, began the installation of high-speed fiber-optic cable underneath Benefield Boulevard in Peekskill, New York.

The work required CSI to cut a two-foot-deep and four- or five-inch-wide trench along the entire length of the 3,000-foot street. CSI also dug 58 one-foot-wide "test pits" in certain locations adjacent to the trench in order to locate preexisting utility lines. CSI backfilled the trench and test pits but, at the time of the incident giving rise to this action, the street had not been repaved.

On October 11, 2006 at approximately 10:00 p.m., plaintiff Bessie Caldwell, who resided on Benefield Boulevard, took her dog out for a walk. She crossed Benefield Boulevard and walked *369the dog for a short distance.

As she was crossing the street again, returning to her residence, plaintiff tripped and fell, injuring her leg. Plaintiff and her husband (suing derivatively) commenced this negligence action against, among others, CSI for creating a hazardous and unsafe condition in the road by failing to properly backfill the trench and test pits, failing to properly or adequately pave over those areas, and failing to install temporary asphalt.

After CSI answered and the parties conducted discovery, the matter proceeded to a bifurcated trial with liability being tried first. Plaintiff testified that she stepped into a “dip in the trench” that caused her to fall.

To rebut this testimony, CSI subpoenaed a physician who had treated plaintiff in the emergency room shortly after the accident. The doctor was called merely as a fact witness to testify concerning his entry in the “history” section of his consultation note that plaintiff “tripped over a dog while walking last night in the rain” (emphasis supplied). He testified consistently with his documented note.

During cross-examination, plaintiffs counsel elicited from the doctor that CSI had paid him \$10,000 for appearing and testifying. The doctor denied that his testimony was influenced by the payment, stating simply that he was there to “testify[] to my records.” His testimony consisted only of his verification that he made the entry into the emergency room record.

No professional opinion was sought nor given. Plaintiffs counsel requested that the court strike the doctor’s entire testimony or, in the alternative, issue either a curative instruction or a jury charge concerning monetary influence.

The following day, before summations, plaintiff’s counsel asked that the court charge the jury that, pursuant to CPLR 8001, the doctor, as a fact witness, was entitled to a witness fee of \$15 per day and \$.23 per mile to and from the place where he was served with the subpoena. Defense counsel countered that the witness fee was the statutory minimum and that there was no prohibition against paying a fact witness for time missed from work.

The court suggested that, rather than issuing a charge, the parties could address the issue during summation and the jury could draw whatever inference it wished from those facts. The court cautioned the parties against referencing the statutory criteria of CPLR 8001.

After summations, where the parties addressed the doctor’s fee payment in detail, the court gave the jury a general bias *370charge but made no specific reference to the doctor’s testimony or the

payment he received for appearing at trial. Following deliberations, the jury found CSI negligent, but that such negligence was not a substantial factor bringing about the accident.

Supreme Court denied plaintiffs motion to set aside the verdict. The Appellate Division affirmed, holding that although CSI's "substantial payment" to the doctor did not warrant exclusion of his testimony, Supreme Court erred in failing "to adequately charge the jury regarding the suspect credibility of factual testimony by a paid witness," but that reversal was not required because the error was harmless (86 AD3d 46, 48 [2d Dept 2011]).

IL We, like the Appellate Division, are troubled by what appears to be a substantial payment to a fact witness in exchange for minimal testimony. Such payments, when exorbitant as compared to the amount of time the witness spends away from work or business, create an unflattering intimation that the testimony is being bought or, at the very least, has been unconsciously influenced by the compensation provided.

While we are concerned by the amount the witness was paid for this minimal attendance and testimony, we conclude that the Appellate Division's order should be affirmed under the circumstances of this case. CPLR 8001 (a) provides that one who is compelled by subpoena to appear at trial is entitled to a \$15 daily attendance fee and \$.23 per mile in mileage fees.

Although this is only the minimum that must be paid to a subpoenaed fact witness, that does not mean that an attorney may pay a witness whatever fee is demanded, however exorbitant it might be. Our courts and disciplinary rules have long acknowledged that "[t]o procure the testimony of witnesses it is often necessary to pay the actual expenses of a witness in attending court and a reasonable compensation for the time lost" (Matter of Robinson, 151 App Div 589, 600 [1st Dept 1912] [emphasis supplied], affd 209 NY 354 [1913]). "[T]here are [also] many incidental expenses in relation to the prosecution or defense of an action at law which can with propriety be paid by a party to the action" (id.; see Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.4 [b] [1] [permitting a lawyer to pay a witness "reasonable compensation... for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related *371expenses"]; see also NY St Bar Assn Comm on Prof Ethics Op 668 [1994]).

What is not permitted and, in fact, is against public policy, is any agreement to pay a fact witness in exchange for favorable testimony, where such payment is contingent upon the success of a party to the litigation (see *Bergoff Detective Serv., Inc. v Walters*, 239 App Div 439, 442-443 [1st Dept 1933]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.4 [b] [prohibiting a lawyer from paying, offering to pay or acquiescing "in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter"])).

Of course, that situation is not presented here. The doctor's testimony was limited to what he had written on his consultation note less than 12 hours after the accident and well before plaintiff

commenced litigation. Nor can it be argued that the doctor tailored his testimony in exchange for the fee or that there is any record evidence that the doctor's consultation note was fabricated.

Plaintiff argues that, having been subpoenaed, the doctor had a legal duty to appear and a legal right to only a \$15 attendance fee, and because he was paid in excess of that amount, Supreme Court should have stricken his testimony. That argument, however, is without merit since the fee set forth in CPLR 8001 (a) is a minimum fee (see 234 Siegel's Practice Review, When Does Fee for Fact Witness in Excess of Statutory Daily \$15 Become Bribe, and What Roles Have Court and Jury in Looking into Issue? at 1 [June 2011] [noting that payment of more than the \$15 daily fee is not precluded under either the law or code of ethics]).

Nonetheless, the payment of such a disproportionate fee for a short amount of time at trial is troubling, and the distinction between paying a fact witness for testimony and paying a fact witness for time and reasonable expenses can easily become blurred. A line must therefore be drawn "between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to 'influence' witnesses to 'remember' things in a way favorable to the side paying them" (NY St Bar Assn Comm on Prof Ethics Op 668).

In addition to asking the trial court to strike the doctor's testimony, plaintiffs counsel asked the court to charge the jury that, per the subpoena, the doctor was required by law to appear at trial and was entitled to a \$15 attendance fee and \$.23 *372per mile and "let [the jury] do with it what they will." This was tantamount to a charge request for a special jury instruction relative to the doctor's potential bias.

We agree with plaintiff that Supreme Court should have issued a bias charge specifically tailored to address the payment CSI made to the doctor. Supreme Court generally instructed the jury that bias or prejudice was a consideration that it should consider in weighing the testimony of any of the witnesses, but this was insufficient as it pertained to CSI's payment to the doctor.

To be sure, Supreme Court properly acted within its discretion in concluding that the fee payment was fertile ground for cross-examination and comment during summation. But because CSI did not even attempt to justify the \$10,000 payment for one hour of testimony, Supreme Court should have also crafted a charge that went beyond the CPLR 8001 requirements. Supreme Court should have instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business.

Should the jury find that the compensation is disproportionate, it should then consider whether it had the effect of influencing the witness's testimony (see PJI 1:90.4). Of course, such a charge must be requested in a timely fashion. Additionally, it is within the trial court's discretion to

determine whether the charge is warranted in the context of a particular payment to a witness, and to oversee how much testimony should be permitted relative to the fact witness's lost time and other expenses for which he is being compensated.

We conclude that, although a more specific jury charge should have been given, Supreme Court's failure to issue one in this case was harmless. The dispute underlying the doctor's testimony was not whether he fabricated the contents of the consultation note.

In other words, the substance of the doctor's testimony was such that the jury's assessment was only tangentially related to the doctor's credibility. Accordingly, the order of the Appellate Division should be affirmed, with costs. Chief Judge Lippman and Judges Graffeo, Read and Smith concur. Order affirmed, with costs.